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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT SEALFON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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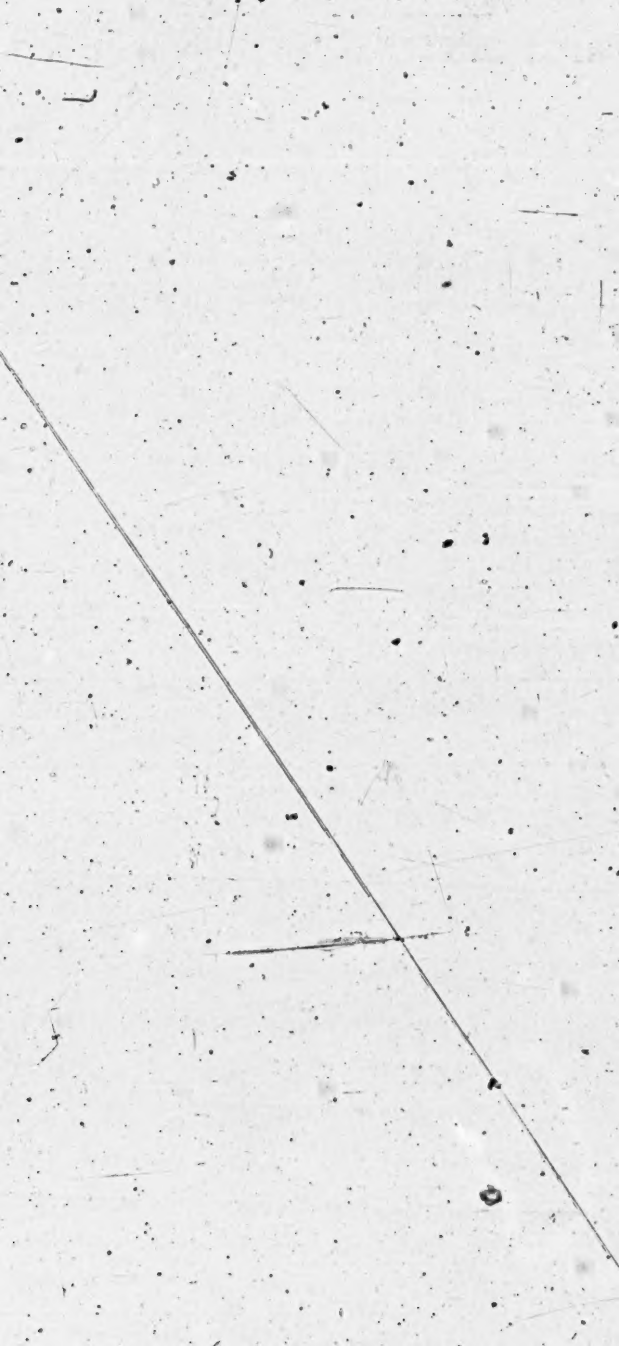

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OPINION BELOW

The opinion of the circuit court of appeals (R. 589–595) is reported at 161 F. 2d 481.

JURISDICTION

The judgment of the circuit court of appeals was entered May 8, 1947 (R. 596). On June 5, 1947, by order of Mr. Justice Burton, the time for filing a petition for a writ of certiorari was extended to July 7, 1947 (R. 598), and the petition was filed July 3, 1947. The jurisdiction of

this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the principle of *res judicata*, petitioner's acquittal of conspiracy to defraud the United States by uttering false invoices to a ration board was a bar to his subsequent conviction of aiding and abetting the uttering of the same invoices.

STATEMENT

On October 2, 1945 (see R. 5), an indictment in twelve counts (R. 8-33) was filed in the District Court for the District of New Jersey, charging that petitioner and Murray Greenberg, Leo Greenberg, and the Fresh Grown Preserve Corporation, on various dates between October 1943 and April 1944, knowingly uttered and caused to be uttered and published as true false writings for the purpose of defrauding the United States, in violation of Sections 28 and 35 of the Criminal Code (18 U. S. C. 72 and 80). Specifically, it was charged that, in order to induce a Local War Price and Rationing Board of Rutherford, New Jersey, to issue sugar purchase certificates to the corporation for the replacement of sugar contained in products allegedly sold and delivered for the use of an "exempt agency" under O. P. A. reg-

ulations,[1] the defendants knowingly uttered and caused to be uttered as true to the board writings purporting to be true copies of invoices for vanilla syrup sold and delivered by the corporation to petitioner for the use of the Brooklyn Navy Yard, whereas in fact the invoices were false in that the syrup was not actually sold to petitioner for resale to the Brooklyn Navy Yard or any other exempt agency. Each count charged a different uttering. The corporation and the two Greenbergs pleaded guilty (R. 5), and petitioner was found guilty on all counts after a jury trial (R. 565–566). Petitioner was sentenced to imprisonment for five years and fined $1,000 on each count, the imprisonment sentences to run concurrently (R. 574). On appeal, the judgment of conviction was affirmed (R. 596).

The Government's evidence was, in brief, as follows:

Petitioner was a manufacturer of and dealer in syrup, operating under the name of Sero Syrup Company (R. 378, 423). In 1942 he had unsuccessfully attempted to obtain from his own ration board, in Brooklyn, New York, sugar replacement certificates for sugar contained in products sold to what were held to be non-exempt agencies (R. 413–416, 421–424).

[1] Under O. P. A. regulations, a manufacturer who sold sugar-containing products directly or indirectly to the Army or Navy, or other "exempt agencies," was entitled to replenish his basic quota of sugar to the extent of the amount of sugar contained in the products thus sold (R. 86–87).

Murray Greenberg, president of the Fresh Grown Preserve Corporation (R. 137), testified that petitioner, a purchaser of syrup from his company (R. 138), expressed a desire in the early part of 1943 to purchase greater quantities of syrup than he was already receiving (R. 138–139). Greenberg told petitioner that the corporation's sugar quota made this impossible (R. 139), but that if petitioner was selling syrup to a "ration-exempt" agency and would write him a letter to that effect, he could sell him additional syrup (R. 140). Petitioner told Greenberg that he was selling syrup to a civilian company located in the Brooklyn Navy Yard and asked "what kind of a deal could he work out" if he wrote Greenberg a letter stating that he "was selling to or at the Brooklyn Navy Yard without mentioning the civilian company, to leave the inference that he was selling the Brooklyn Navy Yard" (R. 140–141). Petitioner required that, in consideration of his sending such a letter, Greenberg sell him syrup at a "cheaper price in the form of a rebate" of two cents for each pound of sugar obtained pursuant to this plan (R. 141, 190–191). Greenberg replied, "You write me that letter and you have got a deal" (R. 141). Petitioner asked Greenberg "what the routine would be if he wrote the letter" (R. 142). Greenberg explained that either he or his brother Leo, vice-president of the corporation (R. 137), would file the letter, together with "invoices showing that I was shipping him syrup for

shipment by him to the Brooklyn Navy Yard," with the O.P.A. form requesting replacement sugar (R. 142, 150). A rough draft of the proposed letter was prepared by petitioner and Greenberg (R. 145–146), and thereafter a final draft, dated March 3, 1943, and without substantial changes, was sent by petitioner to Greenberg (R. 143).[2] False invoices were made out pursuant to the agreement (R. 150–151), and Leo Greenberg filed them with the Rutherford ration board (R. 149; see R. 225–230). The letter itself was never filed with the board, but was retained in the files of the corporation (R. 143; see R. 232, 237, 244–245).

The Greenbergs received approximately 25 million pounds of sugar above their basic quota, ten million of which was sold to petitioner in the form of syrup (R. 190–191). Petitioner was paid approximately $500,000 in cash in the form of "rebates" on all the replacement sugar obtained by the Greenbergs because "the idea * * * originated" with petitioner (R. 152; see R. 190–191).

Petitioner's purchases of syrup from the Greenbergs increased noticeably after the plan was put into effect (R. 295), and the transactions were subsequently handled by the elimination of invoices and the payment of cash, through a trucker,

[2] The terms of this letter are set out in the opinion of the circuit court of appeals (R. 594, fn.).

rather than by check (R. 153–154, 289–292, 296, 300–301).[3]

Petitioner's defense, as revealed by the record, was that the letter of March 3, 1943, did not actually contain any false statement (R. 363, 389–391, 504–505), that it was never presented to the ration board (R. 232, 237, 244–245, 365, 489–490), that he did not give it to the Greenbergs to aid them in any illegal purpose (R. 363, 385, 389–392, 398, 403, 504–506), and that he was never paid any rebates by the Greenbergs for the replacement sugar they obtained (R. 365, 395–397, 496–501).

The case was submitted to the jury on the theory that although petitioner did not directly perpetrate the crimes, he could be held responsible if he was an aider or abettor (R. 542–543).[4]

Several weeks prior to petitioner's trial under the instant indictment, he had been tried under another indictment, filed the same day, October 2, 1945 (see R. 53), charging in substance that petitioner, together with his codefendants in the instant indictment (the Fresh Grown Preserve Corporation, Murray Greenberg, and Leo Greenberg), the S. J. Baron Corporation, the Royal Crown Bottling Companies of Baltimore and

[3] The evidence is also summarized in the opinion of the circuit court of appeals (R. 592–595, fn. 2).

[4] 18 U. S. C. 550 provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Washington, and William C. Franklin, conspired to file false invoices with the same Rutherford ration board in order to enable the Greenbergs and their corporation to obtain improper replacements of sugar for that contained in products sold to the other defendants (Ex. D–3, R. 54).[5] Fifteen overt acts were alleged (*id.*, pp. 5–9), of which one (No. 3) was the sending by petitioner of the letter of March 3, 1943, involved in the instant case (*supra*, pp. 4–5). The Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg, and the S. J. Baron Corporation pleaded guilty to the conspiracy indictment (Ex. D–2, p. 563). The Royal Crown Bottling Companies and Franklin were acquitted by direction of the court (*id.*, pp. 436–438, 563). This left petitioner as the only defendant on trial (*id.*, p. 563).

There was concededly no evidence of any relationship between the Baron Corporation and petitioner (*id.*, pp. 503, 504), but the trial judge nevertheless thought, apparently, that an "overall conspiracy" embracing petitioner, the Greenbergs and the Baron Corporation, could be found

[5] The conspiracy indictment and the stenographic transcript of the proceedings at the conspiracy trial were introduced in evidence as Exhibits D–3 (R. 54) and D–2 (R. 38), respectively, in support of petitioner's pre-trial motion in the instant case to dismiss the indictment on the grounds of former jeopardy and *res judicata* (see R. 37–54). Petitioner did not file these exhibits with his petition for certiorari, but we have lodged them with the Clerk for the information of the Court.

by the jury (see colloquy at *id.*, pp. 503–507) if they concluded that the co-defendants as to whom he had not directed acquittal, had a "common purpose" (see *id.*, pp. 566, 567, 568). However, it is not clear under his instructions as to "common purpose", when considered in connection with his other instructions on conspiracy (*id.*, pp. 562, 564, 565, 567, 578 (the 12th requested instruction)), whether he meant that a verdict of guilty was contingent upon a finding by the jury not only that petitioner had conspired with the Greenbergs but also with the Baron Corporation, or whether it was sufficient merely if they found that he had conspired with the Greenbergs alone. Petitioner was found not guilty, and a judgment of acquittal was entered (R. 37).

Prior to the trial below, petitioner moved to dismiss the indictment on the grounds of former jeopardy and *res judicata* (R. 37). In support of the motion, he introduced in evidence the conspiracy indictment (Ex. D–3, R. 54), the stenographic transcript of the proceedings at the conspiracy trial (Ex. D–2, R. 38), and the judgment of acquittal (Ex. D–1, R. 37). After extensive oral argument (R. 37–54), the motion to dismiss was denied (R. 54). Petitioner renewed his contentions throughout the trial. See, e. g., R. 59, 64, 71–83, 100–101, 136–137, 338–342, 343–345, 359, 476–477.

ARGUMENT

In recognition of the well-settled principle that a conspiracy is a distinct offense from a crime which is an object of the conspiracy (*United States* v. *Bayer*, No. 606, O. T. 1946, decided June 9, 1947; *Pinkerton* v. *United States*, 328 U. S. 640, 644), petitioner has abandoned his contention that the trial below constituted double jeopardy (Pet. 16). He insists, however, as he did below, that his trial as an aider and abettor of the Greenbergs' offenses was, in essence, a re-litigation of the issue of whether he was a conspirator with the Greenbergs and that, this issue having been resolved in his favor at the previous trial, the re-litigation violated the principle of *res judicata* (Pet. 16, 22–23).

We may assume, for present purposes, that the principle of *res judicata* obtains in criminal proceedings in appropriate circumstances even though double jeopardy may not be involved, and that the doctrine is not only applicable to a ruling by a court but to a verdict by a jury. *United States* v. *Adams*, 281 U. S. 202, 205; *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88; *Frank* v. *Mangum*, 237 U. S. 309, 333–334; *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C. C. A. 3); *United States* v. *Meyerson*, 24 F. 2d 855, 856 (S. D. N. Y.); *United States* v. *McConnell*, 10 F. 2d 977,

979 (E. D. Pa.). A clear example of the latter referred to in the opinion below (R. 592), is the *De Angelo* case.[6]

In the instant case, even if it may be assumed that the jury's verdict in the prior case was susceptible of no other interpretation than that they found that petitioner did not conspire with the Greenbergs, a matter not free from doubt under the record in that case (*supra*, pp. 7–8), it is clear that the Government was not seeking in the present case, as in *Pinkerton* v. *United States*, 328 U. S. 640, 645, to impose responsibility upon petitioner for the Greenbergs' offenses upon a conspiratorial basis. If that had been so the verdict of acquittal of conspiracy with the Greenbergs would presumably, by virtue of the doctrine of *res judicata*, have been fatal to the conviction of petitioner for the Greenbergs' crimes. But in the instant case the Government was proceeding against petitioner on a different basis of responsibility, the aider and abettor principle embodied in 18 U. S. C. 550 (footnote 4, *supra*, p. 6). Under that concept, the jury, pursuant to

[6] In that case the situation was that De Angelo had been acquitted of the substantive offense of robbery, upon proof by the Government designed to establish that he was present at and participated in the robbery. At a subsequent trial of De Angelo for conspiracy to commit the robbery, the Government attempted to establish in support of De Angelo's participation in the conspiracy that he was present at the robbery. It was held that the Government was precluded from doing so because of De Angelo's prior acquittal.

the trial judge's instructions, could have found petitioner guilty as a principal equally with the Greenbergs, even though the jury concluded that the Greenbergs engineered the crimes and all that petitioner did was to assist them by some act, provided, of course, he acted knowingly and intentionally (*Bozza* v. *United States*, 330 U. S. 160, 164–165). The letter of March 3, 1943 (*supra*, pp. 4–5), was itself clearly a sufficient act of aid and assistance, for it assured the Greenbergs of petitioner's cooperation, and served as a "cover-up" in case their fraudulent sugar replacement applications should be questioned by the O. P. A. Also, without reference to the letter, there was adequate basis for the jury to find on the evidence, pursuant to the trial judge's instructions, that petitioner counseled, commanded, induced or procured the commission of the crimes by the Greenbergs.

In none of these aspects of aiding and abetting did the guilt of petitioner depend in any respect upon the existence of a conspiracy between him and the Greenbergs, and the charge to the jury was appropriately devoid of any instructions on conspiracy law. Guilt under the aiding and abetting statute depends not upon agreement as such among the culprits, but solely upon assistance in or propulsion to crime. True, what is done may spell out that degree of association and common interest in the criminal venture which make the defendants partners in crime and hence conspira-

tors (cf. *Direct Sales Company* v. *United States*, 319 U. S. 703, and *United States* v. *Falcone*, 311 U. S. 205), with responsibility for substantive offenses committed by fellow conspirators (*Pinkerton* v. *United States, supra*), but that which determines guilt under the aiding and abetting statute is not agreement *qua* agreement, but solely whether X has knowingly assisted Y's crime or has persuaded Y to commit it, or has procured Y to commit his (X's) crime. The two concepts equally result in responsibility for substantive crime (cf. *Pinkerton* v. *United States, supra*), but each depends upon different factors.

Viewed in this light, the evidence of the arrangements between Murray Greenberg and petitioner prior to the letter of March 3, upon which petitioner bases his argument and which, as the trial judge stated in his instructions, was "the crux" of the situation (R. 550), takes on its true significance. In the prior trial the jury, in order to convict, had to find from the evidence that petitioner was associated with the Greenbergs in such a degree as to make them partners in crime and thus conspirators. In the present trial what the jury was required to determine from the evidence was whether there was activity on petitioner's part which made him a knowing assistant in or counselor of the Greenbergs' crimes or a procurer of those crimes, and not, as he insisted, merely a dupe of the Greenbergs—activity which need not spell out a conspiracy.

We therefore submit that there was in this case no basis for the application of the doctrine of *res judicata* and, hence, no necessity for the allowance of evidence addressed to that question.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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